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SECOND DIVISION  
JANUARY 25, 2011

1-09-1666

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT COURT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 13226
	)	
MICHAEL ANDERSON,	)	Honorable
	)	Thomas Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Karnezis and Connors concurred in the judgment.

**ORDER**

*Held:* The defendant was proven guilty beyond a reasonable doubt and defense counsel did not provide ineffective assistance of counsel during trial. The trial court made a proper inquiry into the defendant's claims of ineffective assistance of counsel during the post-trial proceedings and ensured a knowing and voluntary waiver of the defendant's right to counsel. Mittimus corrected to reflect an additional 13 days of time served.

Following a bench trial in the circuit court of Cook County, the defendant, Michael Anderson, was found guilty of possession of a controlled substance with intent to deliver between 1 to 15 grams of heroin and delivery of less than one gram of heroin. Subsequently, the defendant was sentenced to two concurrent 9-year terms of imprisonment. On appeal, the defendant argues

that: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) defense counsel provided ineffective assistance of counsel; (3) the trial court failed to inquire into his claims of ineffective assistance of counsel during post-trial proceedings and denied the defendant's right to counsel because his waiver of counsel was not knowing and voluntary; and (4) he was entitled to an additional 14 days of credit for time spent in custody prior to sentencing. For the following reasons, we affirm the judgment of the circuit court of Cook County.

### BACKGROUND

On June 18, 2008, following a police narcotics surveillance in the area of 750 N. Trumbull Avenue in Chicago, Illinois, the defendant was arrested and subsequently charged with possession with intent to deliver between 1 to 15 grams of heroin (count 1) and delivery of less than one gram of heroin (count 2).

On January 6, 2009, a bench trial was held during which three police officers testified on behalf of the State. Officer McKinley Calhoun (Officer Calhoun) testified that on June 18, 2008, at approximately 4:15 p.m., he conducted a narcotics surveillance in his capacity as a "surveillance officer" in the area of 750 N. Trumbull Avenue. Officer Calhoun was dressed in civilian clothing and drove an unmarked vehicle. He observed the defendant standing at 750 N. Trumbull Avenue where he "engage[d] in brief conversations with unknown blacks who would walk up on foot. He would then receive an unknown amount of [money] from these unknown male blacks." Officer Calhoun then observed the defendant walk to a gangway located at 746 N. Trumbull Avenue, lift up a board, retrieve a clear plastic bag from underneath the board, remove "small items" from the plastic bag and place the plastic bag back underneath the board. The small items retrieved by the defendant

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from the plastic bag were exchanged for an unknown amount of money with “unknown male blacks.” Officer Calhoun testified that he observed the defendant’s conduct from a distance of approximately 15 to 20 feet away and did not use any vision-enhancing devices at that time. He further noted that it was “daylight” at the time of the surveillance and nothing blocked his view of the defendant. Officer Calhoun noticed that the defendant engaged in two transactions and that approximately two minutes transpired between the “first event” and the “second event.” During these events, Officer Calhoun was in radio contact with fellow police officers and described the events to them. The fellow officers arrived within minutes after being contacted by Officer Calhoun. Officer Calhoun directed Officer Joshua Zapata (Officer Zapata), along with other members of his surveillance team, to approach the defendant. Officer Calhoun specifically directed Officer Zapata to the board located on the ground in the gangway at 746 N. Trumbull Avenue. Officer Zapata then lifted up the board and retrieved a clear plastic bag. Meanwhile, other police officers detained the defendant. Officer Calhoun noted that in his career as a police officer, he has had the opportunity to observe narcotics transactions “[s]everal hundreds of time,” and that, based on his experience as a police officer, he believed that the defendant was engaging in “[s]uspect narcotics transaction.”

On cross-examination, Officer Calhoun noted that he and his partner, Officer Griggs, conducted the June 18, 2008 surveillance operation from a southbound-facing vehicle parked on the east side of Trumbull Avenue, while the defendant stood on the west side of the street. The window to his vehicle was “slightly down” during the surveillance. Although he could hear the defendant engage in conversations with the alleged narcotics buyers, Officer Calhoun could not determine exactly what was being said. Officer Calhoun stated that there may have been a fence in front of the

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gangway where the board was located. Officer Calhoun noted that cars were parked on the west side of Trumbull Avenue; however, no cars were parked directly in front of the 746 or 750 Trumbull Avenue locations. He denied hearing the defendant yell “blows”—a street term for heroin—to passing traffic. To his knowledge, the two alleged narcotics buyers were never interviewed or detained. Officer Calhoun testified that the location in which the defendant was arrested was a “high volume” area for drug dealings.

Officer Zapata testified that on June 18, 2008, at approximately 4:15 p.m., he and his partner, Officer Nick Lesch (Officer Lesch), conducted a narcotics surveillance as “enforcement officer[s]” in the vicinity of 750 N. Trumbull Avenue. Officer Zapata was in radio contact with Officer Calhoun, who directed Officer Zapata to a board located in a gangway just north of 746 N. Trumbull Avenue. Officer Zapata lifted up the board and retrieved a plastic bag containing 11 small bags of white powder. No other boards were located in the gangway, and no other plastic bags were located under the board. Officer Zapata believed the white powder to be heroin, and testified that in his experience as a police officer, he has had hundreds of opportunities to observe how heroin was packaged. While Officer Zapata was in the gangway recovering the bags of white powder, fellow officers arrested the defendant. Later at the police station, Officer Zapata gave the retrieved items to Officer McNichols for inventory purposes.

On cross-examination, Officer Zapata testified that the surveillance team on the day in question consisted of six police officers, who rode in three separate vehicles. He noted that he did not see Officer Calhoun nor Officer Calhoun’s vehicle when he arrived at the scene of the incident. Officer Zapata parked approximately one house north of 746 N. Trumbull Avenue on the west side

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of the street when he first arrived at the scene because there was another car parked in front of that location. Officer Zapata observed an open fence at the entrance to the gangway.

Officer McNichols testified that on June 18, 2008, at approximately 4:15 p.m., he was an “enforcement officer” in a narcotics surveillance in the vicinity of 750 N. Trumbull Avenue. During the course of the surveillance, Officer McNichols was in constant radio contact with Officer Calhoun, who was conducting the “actual physical surveillance.” Once Officer McNichols arrived at the surveillance scene with fellow police officers, he approached a gangway at 746 N. Trumbull Avenue where he had a rear view of an individual matching the suspect’s description— “[m]ale black, with braids and \*\*\* a light[-]colored shirt.” At trial, Officer McNichols made an in-court identification of the defendant as the individual matching the suspect’s description. Officer McNichols testified that as he approached the defendant, he observed the defendant standing within the fenced area of the gangway with a second individual who was later identified as Charles Hall (Hall). Officer McNichols observed the defendant engage in what Officer McNichols believed to be a “hand to hand transaction” with Hall, noting that Hall was handing money from Hall’s right hand to the defendant, while the defendant was “in the process of handing [Hall] a small item” in return. Officer McNichols immediately placed both the defendant and Hall under arrest, and recovered “a small [ziplock] baggy with a white powder substance” from the defendant’s hand. Officer McNichols stated that based on his experience as a police officer, he has had “upwards of a thousand” opportunities to see how narcotics are packaged and to observe narcotics transactions, and that he believed the defendant was engaged in a suspect heroin transaction. Later at the police station, Officer McNichols inventoried the “small [ziplock] baggy” he recovered from the

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defendant's hand, along with the other items retrieved by Officer Zapata from the gangway. Officer McNichols noticed that the suspect narcotics retrieved by Officer Zapata and the "small [ziplock] baggy" that Officer McNichols recovered from the defendant's hand were "all exactly the same."

On cross-examination, Officer McNichols testified that during the narcotics surveillance, he wore civilian clothing and that he and his partner, Officer Leahy, parked just north of 746 N. Trumbull Avenue before approaching the defendant on foot. Officer McNichols stated that following the defendant's arrest, he generated a "vice and arrest report" in this incident. Officer McNichols testified that he did not include the description of the suspect or the alleged buyer in either of the two reports.

By stipulation, the parties agreed that Forensic Scientist Martin Palomo (Palomo), if called as a witness, would testify that he received the suspect narcotics at issue in a sealed condition from the Chicago Police Department. Palomo would testify that the tests performed on the suspect narcotics were commonly accepted in the scientific community. The machines used for the testing were calibrated and in proper working order. He would testify that the small bag of white powder recovered from the defendant's hand contained 0.1 grams of powder, and that to a reasonable degree of scientific certainty, the powder tested positive for heroin. Moreover, Palomo would testify that he tested 11 items from the plastic bag retrieved by Officer Zapata underneath the board in the gangway, which, to a reasonable degree of scientific certainty, tested positive for 1.6 grams of heroin.

The defendant did not testify at trial. After the State rested, the trial court denied the defendant's motion for a directed verdict of acquittal. The trial court then found the defendant

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guilty of possession with intent to deliver between 1 to 15 grams of heroin (count 1) and delivery of less than one gram of heroin (count 2), noting that the three police officers testified clearly and convincingly, and that they were not “impeached.”

A scheduled hearing was set for February 13, 2009, to address any post-trial motions and sentencing. On February 13, 2009, defense counsel filed a motion for a new trial. At the February 13, 2009 hearing, however, the defendant informed the trial court that he was seeking an Attorney Registration and Disciplinary Commission (ARDC) investigation against defense counsel and that he wished to proceed *pro se* in filing post-trial motions. Defense counsel advised the trial court that the defendant “wouldn’t talk to me today,” and the trial court informed the defendant that defense counsel had already filed a motion for a new trial. The defendant then told the trial court that he wanted to file a *pro se* motion for a new trial, stating that he preferred to “write it up [himself],” but that he wanted it to supplement the motion for a new trial already filed by defense counsel. The trial court then gave the defendant 30 days to prepare his own motion for a new trial. The trial court also engaged in the following exchange with the parties:

“[THE COURT]: I don’t really know where we stand in terms of representation, counsel. I guess I need to see what the allegations are in the post[-]trial motions, so I’d like everybody back here–

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[THE DEFENDANT]: May I be tendered the discovery as well, your Honor.

[THE COURT]: For what?

[THE DEFENDANT]: So I can also grab other things that were—that were needed out—to create a new post[[]-]trial motion.

[THE COURT]: Well, I'd let you speak with [defense counsel].

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Well, I am going to have you speak with [defense counsel] about that and have him assist you in whatever you need to prepare this motion.

I'd just—It's your right, Mr. Anderson. I would just advise you that, you know, going *pro se* without the benefit of a law school education or experience in criminal matters is often not the wisest thing, so give that some considerable thought before you embark on that.

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[DEFENSE COUNSEL]: Apparently, [the defendant] is requesting discovery materials. Is the Court authorizing me to redact and give those to him?

[THE COURT]: No, what I would like you to do is speak to him in that regard. I will set this down for a short date. And then you let me know if that's going to be required.

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[DEFENSE COUNSEL]: On August 13th of 2008 and again on October 20th of 2008, I conducted extensive jail visits twice with this defendant and read the reports to him, Judge.

[THE COURT]: Okay. Well, that very well may be the case but that was some time ago, so I will – since he wants to act as his own lawyer over I think – what I think is in his best interests, but that’s his choice, why don’t you come back and see me in a couple of weeks and let me know how you’re making out. And then if I need to direct you to provide him with redacted copies of the reports so that he can prepare his motions, then we will go from there.”

The trial court then set February 27, 2009, as the next court date, and advised the defendant that he should “speak with [defense counsel] in the interim and if [he] [persists] in representing [himself], that’s [his] right to do so.”

On the next court date, February 27, 2009, the defendant informed the trial court that he still needed the transcript of the trial proceedings and other discovery materials. The trial court allowed a redacted copy of the discovery materials to be given to the defendant and set March 6, 2009, as the next court date. Defense counsel was present at this scheduled court hearing.

At the next schedule court date, on March 6, 2009, the defendant acknowledged receipt of the transcripts and the redacted discovery materials. The defendant then stated the following to the trial court, “I would be requesting if it’s possible, Your Honor, I would request an assistance of counsel to argue that motion, if possible. I know that I haven’t been to law school and I need help

to understand the language.” The trial court responded that “You can add to [defense counsel’s] motion [for a new trial] but you have to tell me whether you want [defense counsel] to represent you or whether you want to represent yourself.” The trial court further explained that defense counsel could not represent him sometimes, while the defendant proceeds *pro se* at other times. In response, the defendant informed the trial court that he wished to represent himself. The trial court then continued the matter in order to allow the defendant time to file a supplement to the motion for a new trial filed by defense counsel. Defense counsel was present throughout this scheduled court hearing and informed the trial court that the ARDC complaint he received was “unfounded.”

On May 1, 2009, the defendant adopted the February 13, 2009 motion for a new trial filed by defense counsel and supplemented it with his own *pro se* motion for a new trial. The defendant’s *pro se* motion for a new trial alleged, *inter alia*, a claim of ineffective assistance of counsel. On that same day, May 1, 2009, the trial court held a hearing on the defendant’s motion for a new trial. At the start of the hearing, the defendant confirmed for the trial court that he wanted to argue his motion for a new trial *pro se*. The defendant then read the entirety of the motion for a new trial into the record. During the defendant’s argument for ineffective assistance of counsel, the trial court interrupted by explaining to the defendant that defense counsel could not have challenged the grand jury indictment, brought by the State, on the basis that no probable cause existed in regards to Hall. The defendant then resumed his argument relating to the issue of ineffective assistance of counsel, as well as other points in his *pro se* motion for a new trial, and requested that the trial court vacate its judgment and grant him a new trial. In response, the State presented defense counsel, who testified under oath. Defense counsel testified that in October 2008, he issued two subpoenas to Hall

during the pre-trial stages of this case. However, after November 3, 2008, Hall could not be located and the defendant informed defense counsel that he “wished to proceed with this case without the presence of the witness.” Defense counsel noted that he had taken photographs of the scene of the incident, but chose not to use them at trial because defense counsel believed they would “actually actively help the State’s case.” Defense counsel also noted that Officer McNichols testified at trial that the defendant had “a packet of drugs” in his hand; however, defense counsel failed to impeach him with a “vice report” which stated that the defendant had money in his hand. Following the State’s questioning of defense counsel, the defendant did not pose any questions to defense counsel. After hearing the parties’ arguments, the trial court denied the defendant’s motion for a new trial. The trial court noted that based on the credibility assessment it made at trial in observing the police officers’ demeanor, “I do not believe [that] impeachment [by defense counsel at trial] would have been significant enough to change my mind.” Subsequently, the defendant again informed the trial court that he wished to proceed *pro se* at the sentencing stage.

On May 15, 2009, at what was originally scheduled as a sentencing hearing, the trial court advised the defendant of the following:

“[THE COURT]: Again, I’m going to urge you – advise you that I would recommend that you get counsel for this, because you know what I have convicted you of, and you are facing – because of your background, this is a Class X. You are looking at 6 to 30.

You are aware of that, aren’t you?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: You know that you have a right to an opportunity for an attorney for this. We have already gone over this.

[THE DEFENDANT]: I follow your advice and seek counsel.

[THE COURT]: I want [defense counsel] to represent you on this.”

The trial court then continued the matter in order to reappoint defense counsel to represent the defendant.

On June 19, 2009, a sentencing hearing was held. The trial court made the following remarks to defense counsel: “I don’t know if I ever unappointed you, but you’re back on the case now.” Defense counsel then informed the trial court that, “for the record, [the defendant] has refused to discuss post-trial sentencing.” The trial court then addressed the defendant, stating “you talked to me about [the post-sentencing investigation (PSI)] on the last court date and you seemed pretty satisfied with this report. The only thing you wanted was to have [defense counsel] here. Is that where we’re at?” The defendant confirmed the trial court’s statements. After hearing aggravating and mitigating evidence, the trial court sentenced the defendant to nine years of imprisonment. The trial court then denied defense counsel’s motion to reconsider the sentence but gave the defendant 352 days of credit for time served.

On that same day, June 19, 2009, the defendant filed a notice of appeal before this court.

#### ANALYSIS

We determine the following issues: (1) whether the State proved the defendant’s guilt beyond a reasonable doubt; (2) whether defense counsel provided ineffective assistance of counsel; (3)

whether the trial court improperly failed to inquire into the defendant's claims of ineffective assistance of counsel during post-trial proceedings and denied the defendant's right to counsel; and (4) whether the defendant is entitled to an additional 14 days of credit for time spent in custody prior to sentencing.

We first determine whether the State proved the defendant's guilt beyond a reasonable doubt.

The defendant argues that the State failed to prove his guilt beyond a reasonable doubt because Officer Calhoun's account of the crime differed significantly from the testimony of Officers Zapata and McNichols. Specifically, he contends that Officer Calhoun only observed two suspected narcotics transactions occurring that day, but never saw the third narcotics transaction between the defendant and Hall to which Officer McNichols testified. Further, the defendant maintains that this testimony, along with Officer Calhoun's testimony regarding parked cars on Trumbull Avenue and the fact that his car window was "slightly down," undermined Officer Calhoun's credibility.

The State counters that the defendant was proven guilty beyond a reasonable doubt, arguing that the trial court heard credible testimony from Officers Calhoun, Zapata and McNichols. The State argues that any inconsistencies in the witnesses' testimony were minor and within the trial court's province to resolve. We agree.

When the sufficiency of the evidence is challenged on appeal, we must determine " ' whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09, 910 N.E.2d 1263, 1271 (2009), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781, 2789 (1979). A reviewing court

affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73, 740 N.E.2d 1210, 1217 (2000). It is within the province of the trier of fact “to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence.” *Graham*, 392 Ill. App. 3d at 1009, 910 N.E.2d at 1271. A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). A criminal conviction will not be reversed “unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant’s guilt.” *Graham*, 392 Ill. App. 3d at 1009, 910 N.E.2d at 1271.

Based on our review of the evidence in the light most favorable to the State, we find that the defendant’s guilt was proven beyond a reasonable doubt and that any inconsistencies arising from the police officers’ testimony were resolved by the trial court as the trier of fact. Evidence shows that Officer Calhoun personally observed the defendant engage in two suspect narcotics transactions, and described with specificity the details of the defendant’s conduct over the police radio to fellow surveillance officers. Officer Zapata, at the direction of Officer Calhoun, recovered a clear plastic bag from under a board in a gangway at 746 N. Trumbull Avenue. The plastic bag contained 11 small bags of white powder which later tested positive for heroin. The trial court also heard testimony from Officer McNichols that when he arrived at the crime scene, he had a rear view of an individual who matched the suspect’s description. The individual was identified in court as the defendant. Officer McNichols testified that he observed the defendant engage in a “hand to hand transaction” with Hall, after which he placed the defendant under arrest and recovered a small bag of heroin from the defendant’s hand. Based on this evidence, we find that the State proved the

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defendant guilty beyond a reasonable doubt of possession with intent to deliver between 1 to 15 grams of heroin and delivery of less than one gram of heroin. We reject the defendant's contention that Officer Calhoun's credibility was undermined because he never saw the third narcotics transaction, involving the defendant and Hall, as witnessed by Officer McNichols. As discussed, it was within the province of the trial court, as the trier of fact, to determine issues of credibility and to determine the appropriate weight of the testimony, and we will not substitute our judgment for that of the trial court. We further decline to give credence to the defendant's speculative argument that Officer Calhoun's testimony was questionable because the surveillance operation was conducted in a way that the defendant would have overheard Officer Calhoun's radio conversations with fellow police officers during the course of the narcotics surveillance because the window to Officer Calhoun's vehicle was "slightly down." Likewise, we reject the defendant's contention that a reversal of his conviction is warranted because Officer Calhoun's testimony regarding the existence of parked cars at either 746 or 750 N. Trumbull Avenue differed from the testimony of Officers Zapata and McNichols. We find any such discrepancies to be minor and the trial court was best situated to resolve these inconsistencies. Thus, viewing the evidence in the light most favorable to the State, we find that the State proved the defendant guilty beyond a reasonable doubt.

We next determine whether defense counsel provided ineffective assistance of counsel to the defendant at trial.

The defendant argues that defense counsel's failure to impeach Officer McNichols at trial with his arrest and "vice" reports of the defendant amounted to ineffective assistance of counsel. Specifically, he contends that Officer McNichols' arrest report stated that an individual named

“Pitchford” was present at the crime scene and had yelled “blows”—a street term for heroin—to passing traffic; however, Officer McNichols’ trial testimony made no mention of Pitchford. Moreover, the defendant argues that defense counsel was ineffective for failing to impeach Officer McNichols about which offender—the defendant or Hall—had money or drugs in his hand.

The State maintains that the defendant was not denied effective assistance of counsel when defense counsel did not bring forth evidence from Officer McNichols’ arrest report that an individual named “Pitchford” was at the crime scene yelling “blows” to passing traffic. Specifically, the State argues that the defendant has failed to demonstrate that defense counsel’s conduct fell below an objective standard of reasonableness and that the defendant was prejudiced by defense counsel’s performance.

Under the rule for impeachment by omission, a witness’ prior silence may be used to discredit his testimony if the witness had an opportunity to make a statement, and that, under the circumstances, a person normally would have made the statement. *People v. Clay*, 379 Ill. App. 3d 470, 481, 884 N.E.2d 214, 224 (2008). However, “the decision whether to cross-examine or impeach a witness is generally a matter of trial strategy that will not support a claim of ineffective assistance.” *Id.*, 884 N.E.2d at 224-25.

To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that the attorney’s performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 2064-68 (1984). To prove prejudice, the defendant must show that “there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. King*, 316 Ill. App. 3d 901, 913, 738 N.E.2d 556, 566 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.*, 738 N.E.2d at 566. The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and, if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30, 882 N.E.2d 1124, 1136-37 (2008).

Here, at trial, when the State asked Officer McNichols whether anyone was present at the crime scene with the defendant, Officer McNichols replied that Hall was present at the location but did not mention anyone by the name of "Pitchford." Officer McNichols also testified that he observed the defendant engage in what he believed to be a "hand to hand transaction" with Hall, noting that Hall was handing money from Hall's right hand to the defendant, while the defendant was "in the process of handing [Hall] a small item" in return. At the May 1, 2009 hearing on the motion for a new trial, defense counsel, under oath, admitted that he failed to impeach Officer McNichols at trial with a "vice report" which stated that the defendant had money in his hand at the time of arrest. However, even if defense counsel had questioned Officer McNichols on cross-examination with the arrest report regarding an individual named "Pitchford," or had questioned Officer McNichols on what exactly the defendant had in his hand—money or drugs—at the time of arrest, we find that the defendant has failed to show a reasonable probability that the result of the trial would have been different," in light of Officer Calhoun's firsthand account of two of the defendant's narcotics transactions, Officer Zapata's testimony regarding the plastic bag retrieved from the

gangway, and the forensic evidence showing that the white powder contained in the small bags tested positive for heroin. At the May 1, 2009 hearing on the motion for a new trial, the trial court specifically ruled that, based on its assessment of the credibility of the police officers at trial, “impeachment [of Officer McNichols by defense counsel] would [not] have been significant enough to change [the court’s] mind.” Thus, because the defendant has failed to show how he was prejudiced by defense counsel’s failure to impeach Officer McNichols with his arrest and vice reports, we need not consider the performance prong under *Strickland*, or the defendant’s arguments and cases cited in support of those arguments. Accordingly, the defendant has failed to establish that his counsel was ineffective in the manner in which he represented the defendant.

Next, we determine whether the trial court improperly failed to inquire into the defendant’s claims of ineffective assistance of counsel during post-trial proceedings and denied the defendant’s right to counsel.

The defendant argues that this court should remand this case for the appointment of new counsel for the defendant and a new post-trial hearing because the trial court, during post-trial proceedings, failed to conduct a proper inquiry into defense counsel’s performance and to ensure the defendant knowingly and voluntarily waived his right to counsel. Specifically, the defendant contends that the trial court should have conducted a *Krankel* hearing after the trial court was informed on February 13, 2009 that the defendant was “unhappy” with defense counsel and had filed an ARDC claim against defense counsel. Moreover, the defendant contends that new counsel should have been appointed to represent the defendant because the attorney-client bond was “severely damaged” and they could no longer work effectively together.

The State maintains that the trial court made a proper inquiry into the defendant's claims of ineffective assistance of counsel and ensured a knowing and voluntary waiver of the defendant's right to counsel. Specifically, the State argues that the trial court was not required, on February 13, 2009, to conduct a *sua sponte* investigation into the defendant's ARDC claim just because the defendant was "unhappy" with defense counsel. Moreover, the State points out that the appointment of new counsel was unnecessary because the defendant's meritless allegations did not meet the minimum requirements to trigger a *Krankel* hearing. However, on May 1, 2009, once the defendant finally articulated a factual basis for his claim of ineffective of assistance of counsel, the trial court properly inquired into his claim.

In *Krankel*, the defendant, after being represented by defense counsel at trial, filed a *pro se* motion for a new trial in which he alleged that he received ineffective assistance of counsel when defense counsel allegedly refused to present an alibi in his defense and failed to investigate the defendant's whereabouts at the time of the offense. *People v. Krankel*, 102 Ill. 2d 181, 187, 464 N.E.2d 1045, 1048 (1984). The defendant was denied new counsel to assist him in his motion for a new trial. *Id.* at 189, 464 N.E.2d at 1049. On appeal to our supreme court, both the State and the defendant agreed that the defendant "should have had counsel, other than his originally appointed counsel, appointed to represent him at the post-trial hearing in regard to his allegation that he had received ineffective assistance of counsel." Our supreme court remanded the cause for a new hearing on the defendant's motion for a new trial, with instructions to have the defendant represented by appointed counsel other than his originally appointed counsel. *Id.*, 464 N.E.2d at 1049. "*Krankel* thus adopted a procedure that encourages the [trial] court to fully address a defendant's claims of

ineffective assistance and thereby potentially narrow the issues that need to be addressed on appeal.”

*People v. Jocko*, \_\_\_ Ill. 2d \_\_\_, \_\_\_, \_\_\_ N.E.2d \_\_\_, \_\_\_ (2010).

However, cases following *Krankel* have made clear that newly appointed counsel

“is not automatically required in every case in which a defendant presents a *pro se* post[-]trial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* post[-]trial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant’s claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.” *Id.* at \_\_\_, \_\_\_ N.E.2d \_\_\_, citing *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003).

To invoke the rule announced in *Krankel* or its progeny, “a defendant must at least make *some* allegation of ineffective assistance of counsel for the court to consider and must provide some factual specificity of the reason for the allegation.” (Emphasis in original.) *People v. Cunningham*, 376 Ill. App. 3d 298, 304, 875 N.E.2d 1136, 1143 (2007), citing *People v. Ward*, 371 Ill. App. 3d 382, 431-34, 862 N.E.2d 1102, 1147-50 (2007). “Mere awareness by a trial court that a defendant has complained about his counsel’s representation imposes no duty on the court to *sua sponte* investigate a defendant’s complaint.” *Id.*, 875 N.E.2d at 1143. Further, a “bald allegation that counsel rendered

inadequate representation is insufficient for the trial court to consider as an acceptable invocation of *Krankel*.” *Ward*, 371 Ill. App. 3d at 432, 862 N.E.2d at 1148.

In the case at bar, at a scheduled court hearing on February 13, 2009, the defendant informed the trial court that he was seeking an ARDC investigation against defense counsel. We find this assertion to be inadequate to trigger an inquiry by the trial court under *Krankel* because it was devoid of any factual specificity as to the reason for the defendant’s dissatisfaction. In fact, at this hearing, the trial court noted that it needed “to see what the allegations are in the post[-]trial motions,” and ordered the parties to come back on the next court date of February 27, 2009. Thus, at the February 13, 2009 hearing, the trial court had no duty to *sua sponte* investigate the reasons for the defendant’s complaint regarding defense counsel’s representation. See *Cunningham*, 376 Ill. App. 3d at 305, 875 N.E.2d at 1144 (“[a] trial court’s awareness of an ARDC complaint is not equivalent to an actual claim of ineffective assistance of counsel”).

However, the record shows that on May 1, 2009, the trial court acknowledged that it had received copies of the defendant’s *pro se* motion of a new trial, which supplemented defense counsel’s previously filed motion for a new trial. The defendant’s *pro se* motion for a new trial alleged, *inter alia*, a claim for ineffective assistance of counsel. Based on our review of the record, we find that the defendant’s *pro se* motion for a new trial presented some factual specificity so as to trigger an inquiry under *Krankel*. The record reveals that the trial court then held a hearing on the motion for a new trial, allowing the defendant to present his motion, which he did by reading its entirety into the record. During the defendant’s argument for ineffective assistance of counsel, the trial court interrupted by explaining that certain pre-trial conduct by defense counsel, alleged to be

ineffective by the defendant, was in fact proper. Although the trial court did not directly question defense counsel about his trial conduct, the State, in response to the defendant's motion for a new trial, presented defense counsel's testimony under oath. The trial court then heard testimony from defense counsel as to why Hall was not presented as a witness at trial or why photographs of the crime scene were never used at trial. Further, defense counsel acknowledged that he failed to impeach Officer McNichols with a "vice report" which stated that the defendant had money, rather than drugs, in his hand at the time of arrest. The defendant also had an opportunity to cross-examine defense counsel, but declined to do so. After hearing the parties' arguments, the trial court denied the motion for a new trial.

Based on our review of the record and the defendant's allegations of ineffective assistance of counsel, we conclude that there was no showing that defense counsel neglected the defendant's case so as to warrant an appointment of new counsel in post-trial proceedings. The defendant's allegations were without merit and related to matters of trial strategy, and thus, the trial court conducted an adequate inquiry into the defendant's allegations of ineffectiveness, and did not err in declining to appoint new counsel and in denying the motion for a new trial. See *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637; *Ward*, 371 Ill. App. 3d at 433, 862 N.E.2d at 1149 ("[w]here a defendant's *pro se* post[-]trial ineffective assistance claims address only matters of trial strategy, the court may dismiss those claims without further inquiry"). Further, we note that it would also have been appropriate for the trial court to deny the motion for a new trial on the basis of its own knowledge of defense counsel's performance during the bench trial as well as on the insufficiency of the allegations viewed in light of the court's knowledge of the record. See *Moore*, 207 Ill. 2d at 79, 797

N.E.2d at 638. Therefore, we find no error in the trial court's proper inquiry into the defendant's claim for ineffective assistance of counsel and in its denial of the motion for a new trial.

Likewise, we do not accept the defendant's contention that the trial court failed to ensure that the defendant knowingly and voluntarily waived his right to counsel. The defendant argues that he did not make a knowing and voluntary waiver of his right to counsel because the trial court failed to properly admonish him, pursuant to Supreme Court Rule 401 (134 Ill. 2d R. 401), of the potential range of sentence he faced.

The State counters that strict compliance to Rule 401 was not required at this late stage in the proceedings and that, even if Rule 401 admonishments were mandatory, the trial court substantially admonished the defendant and ensured a valid waiver of counsel. Specifically, the State argues that the defendant was aware of the potential range of sentence during the July 29, 2008 hearing to reduce bond and had acknowledged at the originally scheduled sentencing hearing on May 15, 2009, that he faced between 6 to 30 years of imprisonment. Thus, the State contends, the defendant's knowingly and voluntarily waived his right to counsel.

Rule 401(a) states in pertinent part that “[the] court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands \*\*\* the nature of the charge, the minimum and maximum sentence, \*\*\* and that he has a right to counsel.” 134 Ill. 2d R. 401(a).

In *People v. Young*, the defendant was convicted of aggravated battery in a jury trial in which he was represented by counsel, and was subsequently sentenced to three years in prison. *People v.*

*Young*, 341 Ill. App. 3d 379, 381, 792 N.E.2d 468, 471 (2003). During post-trial proceedings, however, the defendant filed two *pro se* motions for the appointment of new counsel, alleging that defense counsel was ineffective. *Id.* at 382, 792 N.E.2d at 471. A hearing was held on the defendant's post-trial motions, during which the defendant appeared without counsel and the trial court accepted the defendant's waiver of counsel. *Id.*, 792 N.E.2d at 471. On appeal, the defendant argued that the trial court failed to admonish him pursuant to Rule 401 before holding that he had waived his right to counsel. *Id.*, 792 N.E.2d at 472. The reviewing court disagreed, holding that Rule 401(a) did not express an intent to require a court to comply with the technical requirements of the rule "when a defendant discharges his attorney late in the proceedings." *Id.* at 387, 792 N.E.2d at 475. The *Young* court further noted that "[a] defendant who has been represented by an attorney for a period of time is more likely to understand the workings of the system than a defendant who first appears in court." *Id.* at 387, 792 N.E.2d at 475. Moreover, the *Young* court reasoned that the language of Rule 401(a) "manifests only the intent to deal with defendants who are considering a waiver of counsel at the initial-appointment stage of the proceedings, \*\*\* [and] that the admonishments are to be given to a defendant 'accused' of an offense 'punishable' by imprisonment." *Id.* at 387, 792 N.E.2d at 475. Because the defendant had already been convicted of the offense and sentenced, the *Young* court held that the defendant "already knew everything a Rule 401(a) admonishment would have told him." *Id.* at 387, 792 N.E.2d at 475.

Like *Young*, the defendant in the case at bar was represented by defense counsel throughout the duration of the trial, and did not choose to proceed *pro se* until late in the proceedings. Under the guidance of *Young*, we find that the trial court was not required to comply with the technical

requirements of Rule 401(a). Although the defendant in the instant case, unlike *Young*, had yet to be sentenced at the time he waived his right to counsel, we find that the defendant “already knew everything a Rule 401(a) admonishment would have told him.” See *id.* at 387, 792 N.E.2d at 475.

The record shows that there was no doubt, and the defendant does not dispute, that the defendant understood the nature of the charges against him because he had just been convicted of those charges, and that the trial court repeatedly admonished the defendant at several post-trial court dates that the assistance of counsel was strongly advised. The defendant only takes issue with the fact that the trial court did not properly admonish him of the potential sentencing range. However, based on our review of the record in its entirety, we find that, even if compliance with Rule 401(a) were required in the instant case, the trial court had substantially complied with the admonishments in Rule 401(a). At the July 29, 2008 hearing on the motion to reduce bond, the trial court stated, in the presence of the defendant, that he was a “Class X mandatory,” and that he has had prior convictions which precluded him from being “probationable” on the charges. The record further shows that at a hearing on May 15, 2009, prior to sentencing, the trial court again advised the defendant to obtain the assistance of counsel because “this is a Class X. You are looking at 6 to 30. You are aware of that aren’t you?” The defendant acknowledged that he was aware that he faced a sentence between 6 to 30 years of imprisonment. See *People v. Phillips*, 392 Ill. App. 3d 243, 263, 911 N.E.2d 462, 481 (2009) (trial court substantially complied with Rule 401(a) where the defendant was admonished nine months earlier and again one month later prior to trial of the possible penalties that he faced). Thus, viewing the record as a whole, we find that the defendant was aware of “everything a Rule 401(a) admonishment would have told him,” and the defendant made a knowing and voluntary

waiver of his right to counsel.

Finally, we determine whether the defendant was entitled to an additional 14 days of credit for time spent in custody prior to sentencing.

The defendant argues that he was entitled to an additional 14 days of pre-sentencing credit because he was in custody for a total of 366 days from the day he was arrested to the day of his sentencing, but that he only received 352 days of credit. He specifically argues that because he spent a portion of June 19, 2009, the day of sentencing, in custody, he was entitled to receive credit for that day.

The State concedes that the defendant spent a total of 365 days in pre-sentence incarceration. However, the State argues that he was entitled to only 13 more days of pre-sentence incarceration credit because the date of sentencing should not be included in the credit. Thus, it argues, the mittimus should be corrected to reflect only 13 additional days of pre-sentence credit.

A defendant shall be given credit “for time spent in custody as a result of the offense for which the sentence was imposed.” 730 ILCS 5/5-8-7 (West 2006). “The credit requirement of section 5-8-7(b) is meant to account for all time served in confinement for a particular offense.” *People v. Latona*, 184 Ill. 2d 260, 270, 703 N.E.2d 901, 906 (1998). This includes time spent in custody prior to sentencing from the time of the defendant’s arrest. See *People v. Lignons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A reviewing court may correct the mittimus without remanding the cause to the trial court. *People v. Hill*, 402 Ill. App. 3d 920, 929, 932 N.E.2d 173, 182 (2010).

The record shows, and the parties agree, that the defendant was arrested on June 18, 2008

and remained in custody until he was sentenced on June 19, 2009. The total number of days spent in custody by June 18, 2009 was 365 days. In *People v. Williams*, this court held that “a defendant is not entitled to credit for the day of sentencing if the mittimus is issued effective that same day.” *People v. Williams*, 394 Ill. App. 3d 480, 483, 917 N.E.2d 547, 550 (2009); *appeal allowed*, No. 109361 (January 27, 2010); accord *People v. Jones*, 397 Ill. App. 3d 651, 656, 921 N.E.2d 768, 772 (2009); but *cf. Hill*, 402 Ill. App. 3d at 931, 932 N.E.2d at 183 (defendant was entitled to pre-sentencing credit for the date of sentencing where the defendant was not admitted to the Department of Corrections until the day after sentencing). Here, the mittimus was issued and made effective by the trial court on June 19, 2009, the same day that the defendant was sentenced to nine years of imprisonment. Thus, we find that the defendant is only entitled to pre-sentencing credit for time spent in incarceration from the day of his arrest up to but excluding the day of sentencing.

The defendant relies on *Lignons* in support of his argument that the day of sentencing must be included in crediting his time spent in incarceration because he served a portion of the sentencing day in custody. We note that generally, a defendant “held in custody for any part of the day should be given credit against his sentence for that day.” *People v. Smith*, 258 Ill. App. 3d 261, 267, 630 N.E.2d 147, 152 (1992). However, we find the defendant’s reliance on *Lignons* to be misguided, where the *Lignons* court held that a defendant was entitled to pre-sentencing credit for each day or portion of a day the defendant spent in custody prior to sentencing, “including the day he was taken into custody.” *Lignons*, 325 Ill. App. 3d at 759, 759 N.E.2d at 174. The *Lignons* court noted that the record showed, and the State conceded, that the *Lignons* defendant was entitled to 107 days, rather than 106 days, of pre-sentence credit. *Id.*, 759 N.E.2d at 174. However, we find no indication in

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the holding of *Lignons* to suggest that a defendant may receive credit for the day of sentencing even if the mittimus was issued and effective on that same day. Therefore, the defendant was entitled to only 13 additional days of pre-sentence credit for time spent in incarceration, for a total of 365 days.

Accordingly, for the foregoing reasons, we: (1) affirm the defendant's conviction and sentence; and (2) order the mittimus corrected to reflect an additional 13 days of pre-sentencing credit, for a total of 365 days for time served.

Affirmed; mittimus corrected.